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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ind. E Com. De Alimentos Desidratados Alcon Ltda.

Serial No. 76/158,811

Perla M. Kuhn of Hughes Hubbard & Reed LLP for Ind. E Com. De Alimentos Desidratados Alcon Ltda.

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(Thomas G. Howell, Managing Attorney).

Before Hohein, Hairston and Drost, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Ind. E Com. De Alimentos Desidratados Alcon Ltda. has
filed an application to register the mark "LABCON PROTECT" for
"chemical products, namely, aquarium water conditioners."¹

¹ Ser. No. 76/158,811, filed on October 20, 2000, which is based on an
allegation of a bona fide intention to use such mark in commerce.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "LABCONCO," which is registered for, in particular, "water purification units and parts thereof,"² as to be likely to cause confusion, or mistake or to deceive.

² Reg. No. 1,489,951, issued on May 31, 1988, which sets forth March 1963 as a date of both first use anywhere and first use in commerce; combined affidavit §§8 and 15. While such registration, in its entirety, covers the following goods, the refusal to register, as noted above, is based solely upon the registration of the mark "LABCONCO" for "water purification units and parts thereof":

"scientific apparatus, namely, tissue culture enclosures, and parts thereof; laboratory gloves, ultra violet lights; kjeldahl distillation apparatus, kjeldahl nitrogen apparatus, kjeldahl digestors, fat extractors, crude fiber apparatus, laboratory equipment washers, and parts thereof, flasks, ampules, serum bottles; stopperable chambers, acid traps, vacuum traps, vacuum pumps, vacuum gauges, and parts thereof; portable laboratory apparatus, namely carts, tables, instrument desks, caddys [sic] and flask carriers; tray dryers; and fire extinguishers" in International Class 9;

"environmental control apparatus, namely fume hoods, fume hood blowers, laboratory blowers, and parts thereof; laminar flow safety enclosures and parts thereof; laboratory ducting, filters for laboratory ventilating systems, exhaust filter packs; fume absorbers, fume scrubbers, water purification units and parts thereof; freeze drying units, shell freezers, refrigerated drying chambers, and parts thereof; manifolds, dry ice freezers, bulk drying chambers, heaters for laboratory drying chambers, glove box safety enclosures and parts thereof; and sinks with integral work surface[s]" in International Class 11; and

"laboratory general purpose cabinets, chairs, tables and dessicator cabinets" in International Class 20.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.³

Turning first, therefore, to consideration of the respective goods, applicant argues that contrary to the Examining Attorney's contention that the goods are highly related because they are both used to purify water, its "chemical products, namely, aquarium water conditioners," are goods which, as shown by the information it made of record from its website, "are in the form of liquid drops for use in aquariums, tanks and terrariums." Such goods, applicant notes, condition tap water by neutralizing the chlorine and heavy metals therein and protect marine life by "form[ing] a film on

the body of the fish or animal, which preserves the natural mucus, scales and flippers of fish and facilitates recovery of wounds and perfect development of the shell in reptiles." In contrast, applicant insists, registrant's goods are "'scientific apparatus" in the form of 'water purification units and parts thereof,'" which "is technical equipment which purifies water for use in the laboratory."

Applicant maintains, therefore, that categorizing its goods and those of the registrant "within the same broad field of water treatment products does not mean that the goods are similar or confusion is likely because both the use and purpose of the goods are different" (*italics in original*):

The Examining Attorney's attempt to classify both products in the same general category of goods, since both technically "purify water," ignores the fact that Appellant's goods are *chemicals*, and not *apparatus*. This makes confusion unlikely since Appellant's goods are chemicals in the form of drops and used for the protection of reptiles and aquatic animals, while the ... [registrant's product] is an apparatus in the form of sophisticated mechanical equipment used for water purification with laboratory testing--a markedly different purpose and form.

In addition, applicant contends that the channels of trade for the respective goods are different in that, as shown by the

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

excerpts which it made of record from registrant's website, registrant's water purification units "are marketed to scientists, laboratories, or other professional or institutional customers and are sold through distributors." Applicant emphasizes that its aquarium water conditioners, on the other hand, are the kinds of chemical products which "would be marketed directly to individual consumers ... through ordinary consumer retail channels, such as a pet food store." Thus, according to applicant:

Since pet food stores do not offer highly specialized scientific equipment and distributors specializing in scientific equipment would not sell pet supplies, consumers would not encounter the respective goods in the same channels of trade. This belies the likelihood that similar purchasers would encounter these goods.

Finally, applicant urges that "[w]hen the class of buyers for the goods are professional or commercial purchasers, the sophistication of the consumers reduces the risk of likelihood of confusion between marks." Applicant maintains, in this regard, that "[b]ecause sophisticated purchasers display a higher degree of care, the sophistication of the consumers may be 'the most critical factor' in the likelihood of confusion analysis," citing *Astra Pharmaceutical Products, Inc. v. Beckman Instruments, Inc.*, 220 USPQ 786, 790 (1st Cir. 1983). In this case, applicant notes that registrant's water purification units

would be purchased, as previously indicated, by scientists, laboratories and other professional or institutional customers through various distributors of such scientific laboratory apparatus. A necessary consequence thereof, applicant asserts, is that such purchasers will be highly discriminating and careful in their purchasing decisions in that:

Because of their training, as well as the potentially serious consequences attendant to choosing an improper product, it can be expected that professionals in laboratories will use a high level of care in selecting their products. It is extremely unlikely that a scientist working in a laboratory would associate the sophisticated technical equipment used in the laboratory [and] sold through distributors with the drops used to protect the fish and turtles in a terrarium or aquarium. In fact, it is unlikely that the [respective] goods would even come to the attention of the same kinds of purchasers, and in the unlikely event that they did, the individual would be able to distinguish [the goods by] the marks.

We are constrained, however, to agree with the Examining Attorney that, as identified in applicant's application and the cited registration, the goods at issue are sufficiently related that, if marketed under the same or similar marks, confusion as to the source or sponsorship thereof is likely to occur. As the Examining Attorney correctly points out, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited

registration, and not in light of what such goods are shown or asserted to actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where applicant's and registrant's goods are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

As the Examining Attorney further observes, not only is it obvious that applicant's goods, which are broadly identified as "chemical products, namely, aquarium water conditioners, "are used in aquariums," but with respect to registrant's broadly identified "water purification units and parts thereof," the four articles made of record from a search of the "NEXIS" database demonstrate, according to the Examining

Attorney, that "water purification systems are also used in aquariums." Specifically, the Examining Attorney points out that (bold type in original):

[In] the first article [it is] stated that "Ocean Journey is a nonprofit **aquarium** on the banks of the South Platte RiverEmployees ... have raised concerns about possible **water purification** problems ...". The other three articles demonstrate that aquariums use water purification systems. It is clear that Applicant's goods and the Registrant's goods are similar in nature in that water purification systems and aquarium water conditioners are both used in aquariums.

Because Registrant's identification [of its goods as] "water purification units" is not limited in the type of use, and the evidence of record establishes that water purification units are used with aquariums, Registrant's "water purification units and parts thereof" must be considered to include those water purification units that are used with aquariums. It follows, then, that Applicant's goods and Registrant's good are both used to cleanse and purify aquarium water. As Applicant's goods and Registrant's goods would then serve the same, or nearly the same, purpose, the goods are similar in nature and therefore related.

While applicant, in its reply brief, again stresses that its goods are water conditioning chemicals whereas registrant's goods are water purification units, it is well established, as the Examining Attorney properly points out, that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is

sufficient, instead, that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Here, as another of the "NEXIS" articles made of record makes clear, water purification units would be used, just as applicant's water conditioning chemical products would also be used, in home aquariums and not just in commercial ones:⁴

"Aquarium scientists and engineers are very careful, beginning with the capture of the fish in the Florida Keys. Each fish is transported in as safe a manner as possible to the aquarium, given a fresh water bath and placed in a quarantine tank for seven to

⁴ For completeness, we note that the other two "NEXIS" articles in the record refer, in relevant part, to aquarium water purification in such contexts as the following (emphasis added):

"Opening a landlocked **aquarium** from scratch also demands practicality. [Curator of the Ocean Journey aquarium Scott] Nygren must juggle several major initiatives at once, ranging from construction management to **water purification** to fish collecting." -- Denver Rocky Mountain News, April 13, 1997; and

"Marine **aquarium** with a dialysis **water purification** system." -- Orlando Sentinel, October 16, 1995.

60 days to be treated for diseases and adapted to aquarium life. Then it is released into the big, 500,000 gallon coral-reef display that is the main focus for the aquarium's visitors.

....

What makes the fish in the coral-reef tank do so well? **Purification!** The **aquarium** has an elaborate, carefully tuned system to keep the **water** in the exhibit at just the right balance for healthy fish.

....

....

The '**purified**' seawater is then returned to the exhibit, where it begins another cycle of having fish live in it and then passes through the cleansing procedure again. **Aquariums everywhere (such as the Pier Aquarium in St. Petersburg or even those in private homes) use variations of the same purification techniques.**" -- St. Petersburg Times, March 7, 1995.

In the present case, nothing in applicant's identification of its goods limits its "chemical products, namely, aquarium water conditioners" to purchases by ordinary consumers, through pet supply shops or pet food stores, for use in their home aquariums, nor is there any restriction in registrant's identification of its "environmental control apparatus" which restricts its "water purification units and parts thereof" to sales, through specialized distributors, to such sophisticated buyers as marine biologists, managers of scientific laboratories or directors of commercial aquariums. Both applicant's chemical products, namely, aquarium water conditioners, and registrant's pieces of apparatus or equipment,

namely, water purification units and parts thereof, would thus be sold to the same classes of purchasers through the same channels of trade consumers. Ordinary consumers would buy the respective products for use in their home aquariums through pet supply shops or pet food stores, and sophisticated scientific and business purchasers would obtain such goods for use in connection with commercial aquariums through specialized distributors of those products. The respective goods, by virtue of the fact that both are used to treat and improve the quality of water in aquariums, are thus so closely related that their marketing under the same or similar marks would be likely to cause confusion as to the origin or affiliation thereof.

Turning, therefore, to consideration of the marks at issue herein, applicant urges that confusion is not likely because, when viewed in their entirety, there are significant differences between them. Although conceding, in its main brief, that "the terms 'labcon' and 'labconco' are similar," applicant nonetheless insists that "there are also noticeable differences between the similar terms 'labcon' and 'labconco' which helps [sic] further distinguish the marks." The sole such difference mentioned by applicant, however, is that registrant's mark "uses the letters 'co' at the end of 'labcon,' whereas

Appellant does not."⁵ Although applicant observes, moreover, that its mark "consists of an arbitrary term, LABCON, along with the suggestive term PROTECT," applicant acknowledges that the latter term, while "help[ing] to distinguish the mark's overall appearance from the cited mark," is otherwise weak as an indicator of source inasmuch as it admittedly "suggests the protection" provided to marine life and aquatic environments by its aquarium water conditioners.

We concur with the Examining Attorney, however, that overall, applicant's mark "LABCON PROTECT" and registrant's "LABCONCO" mark are so similar in commercial impression that, notwithstanding that there are certain differences in the marks which are apparent on a side-by-side comparison thereof, confusion is likely. As the Examining Attorney correctly points out, the proper test for determining likelihood of confusion is not whether the respective marks are distinguishable on the basis of a side-by-side comparison, but whether they create basically the same overall commercial impression. The reason therefor is that a side-by-side comparison is ordinarily not the

⁵ While applicant also points out that, as shown by an excerpt which it made of record from registrant's website, the term "labconco" is "an acronym for the original owner's name, '*Laboratory Construction Company*'" (italics in original), there is nothing in the record which indicates, for example, that customers for applicant's goods would be aware of the derivation or underlying meaning of registrant's "LABCONCO" mark. Such consumers would consequently regard registrant's mark, in terms of its meaning or connotation, in

way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains only a general rather than a specific impression of marks. See, e.g., *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *Envirotech Corp. v. Soloron Corp.*, 211 USPQ 724, 733 (TTAB 1981); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Here, as applicant concedes, not only are the terms "LABCON" and "LABCONCO" similar in all respects (including sound, appearance and connotation), but such terms are substantially similar, differing only in the presence of the suffix "CO" in registrant's mark, which would readily be regarded as signifying nothing more than a business entity (specifically, a company). The additional presence of the term "PROTECT" in applicant's "LABCON PROTECT" mark is insufficient to distinguish such mark from registrant's "LABCONCO" mark since it is highly suggestive of the purpose or use of applicant's

essentially the same manner as the "LABCON" portion of applicant's "LABCON PROTECT" mark.

aquarium water conditioners, which is to protect the fish and other animal life in the aquatic environment of an aquarium.

When considered in their entirety, the respective marks are so substantially similar in commercial impression that confusion as to source or sponsorship of applicant's aquarium water conditioners and registrant's water purification units and parts thereof is likely to occur.

Furthermore, while it would seem to be the case that, unlike ordinary consumers, purchasers of applicant's aquarium water conditioners and registrant's water purification units for use in connection with commercial aquariums would typically be knowledgeable and discriminating customers, the sophistication and care exercised by such buyers in their selection of applicant's and registrant's products "does not necessarily preclude their mistaking one trademark for another" or demonstrate that they otherwise are entirely immune from confusion as to source or sponsorship. *Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and *In re Pellerin Milnor Corp.*, 221 USPQ 558, 560 (TTAB 1983). Nonetheless, to the extent that the differences in the respective goods and marks, as argued by applicant, may serve to raise any doubt as to whether confusion is likely, we resolve such doubt, as we must, in favor of the registrant. See, e.g.,

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In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) and In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Columbes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Accordingly, we conclude that customers who are familiar or acquainted with registrant's mark "LABCONCO" for its "water purification units and parts thereof" would be likely to believe, upon encountering applicant's substantially similar mark "LABCON PROTECT" for "chemical products, namely, aquarium water conditioners," that such closely related goods emanate from, or are sponsored by or associated with, the same source.

Decision: The refusal under Section 2(d) is affirmed.